

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 94-140-T - ORDER NO. 95-77 ✓  
JANUARY 20, 1995

IN RE: Application of Ehmke/Carolina Movers, ) ORDER DENYING  
Inc., 11626-F Wilmar Blvd., Charlotte, ) PETITION FOR  
NC 28273 for a Class E Certificate of ) REHEARING AND  
Public Convenience and Necessity. ) RECONSIDERATION

This matter comes before the Public Service Commission of South Carolina (the Commission) on the December 21, 1994 Petition for Rehearing and Reconsideration (the Petition) of this Commission's Order No. 94-1212 which granted the Application of Ehmke/Carolina Movers, Inc. (Ehmke/Carolina or the Applicant) for a Class E Certificate of Public Convenience and Necessity for household goods authority. The Petition was filed on behalf of Carey Moving & Storage, Inc., Carey Moving & Storage of Greenville, Inc., Arrow Moving & Storage, Inc., Smith Dray Line & Storage, Inc. and Austin Moving & Storage, Inc. (hereafter collectively referred to as the Intervenor).

The Commission found in Order No. 94-1212 that Ehmke/Carolina is fit, willing, and able to provide the services for which it sought authority. The Commission further concluded that the public convenience and necessity was not being served and that the public convenience and necessity would be better served by allowing Ehmke/Carolina into the market. The Intervenor submit that the Commission should reconsider its decision for the following

reasons: 1) that the Commission used an unfair standard in reviewing the Intervenor's evidence; 2) that the record supports a finding that the public convenience and necessity is currently being served; and 3) that the record contains no evidence that conditions have changed since August 22, 1994, when the Commission ruled that the public convenience and necessity was being served in another Docket.

First, the Intervenor's assert that the Commission should reconsider Order No. 94-1212 because the Commission used an unfair standard in reviewing the Intervenor's evidence. In Order No. 94-1212, the Commission found that the Intervenor's had "not established that the public convenience and necessity would be adversely affected by the entry of Ehmke/Carolina into the market." (Order No. 94-1212 at p. 9). The Commission then concluded that the public convenience and necessity was not being served and that the public convenience and necessity would be better served by allowing Ehmke/Carolina into the market. (Order No. 94-1212 at p. 9). The Intervenor's contend that the Commission placed an unfair burden on the Intervenor's by finding that the public convenience and necessity would not be adversely affected by Ehmke/Carolina's entry into the market.

The Commission believes that the Intervenor's allegation that the Commission used an unfair standard is without merit. S.C. Code Ann. §58-23-330 sets forth the grounds for the issuance or denial of a Certificate of Public Convenience and Necessity and provides in relevant part:

[a]n applicant applying for a certificate ... to operate as a motor vehicle common carrier may be approved upon a showing based on criteria established by the commission that the applicant is fit, willing, and able to perform appropriately the proposed service. If an intervenor shows or if the commission determines that the public convenience and necessity is being served already, the Commission may deny the application. (Emphasis added.)

While it was not necessary for the Commission to make a finding that Ehmke/Carolina's entrance into the market would not adversely affect the public convenience and necessity, to do so was not error. The Commission's conclusion that the public convenience and necessity is not currently being served was based upon all of the evidence in the record and not on any one isolated fact. Further, S.C. Code Ann. §58-23-330 establishes that even if an intervenor demonstrates that the public convenience and necessity is currently being served, the Commission may deny the application. Clearly, the determination of whether the public convenience and necessity is being served is discretionary with the Commission as the Commission is not required to deny the Application even if the Commission determines that the public convenience and necessity is being served.

Secondly, the Intervenors contend that the record supports a finding that the public convenience and necessity is currently being served. The Intervenors state that the Applicant's witnesses were not able to testify that the household goods carriers currently certified in South Carolina were not adequately serving the public. This contention is without merit. Once the Applicant shows that it is fit, willing, and able to provide the services requested, then the burden of proof shifts to the Intervenors. The

Commission found, and witnesses for the Intervenor also admitted, that the Applicant is fit, willing, and able. The Applicant has no legal duty or obligation to prove that the public convenience and necessity is not being met in South Carolina. The South Carolina Court of Appeals addressed this issue in Anderson Armored Car Service, Inc. v. The South Carolina Public Service Commission, 295 S.C. 148, 367 S.E.2d 444 (Ct. App. 1988). In the Anderson case, the Court of Appeals stated "[i]f the adequacy of existing service to meet the public convenience and necessity is in issue" the language of S.C. Code Ann. §58-23-330 "plainly requires the intervenor to prove the affirmative; it does not remotely support the applicant must prove the negative." 367 S.E.2d at 446.

Additionally, the Commission does not believe that the Intervenor established by their witnesses that the public convenience and necessity is being met by the existing carriers. The law is clear that while detriment to income of existing carriers is relevant, it is not determinative and should not in itself defeat an application for additional service. Welch Moving & Storage, Inc. v. The Public Service Commission of South Carolina, 301 S.C. 259, 391 S.E.2d 445 (1990). Further, the Commission does not believe that the study conducted by the Intervenor's expert witness was sufficient to determine that the public convenience and necessity is being served.

Next, the Intervenor contend that the record contains no evidence that conditions have changed since August 22, 1994, when the Commission ruled that the public was being served. On August 22, 1994, the Commission issued Order No. 94-864, in Docket No.

93-258-T. Order No. 94-864 denied the Application of a carrier who requested a Class E Certificate of public convenience and necessity for household goods authority. The Intervenor states that the record is devoid of any evidence demonstrating any change which has taken place in the provision of moving and storage services since the Commission issued its Order on August 22, 1994. The Commission finds no merit in this allegation. Every case before the Commission must be decided on the facts and evidence presented in that case. The Intervenor would add a burden to the Applicant which is not stated in the law. It is a misstatement of law and a clear injustice to argue that an Applicant must show a change in conditions subsequent to another Order issued by this Commission in a totally separate case. As stated above, the law of South Carolina requires an Applicant to carry the burden of showing that it is fit, willing, and able to provide the proposed services. The burden then shifts to any Intervenor to show that the public convenience and necessity is currently being met on a case by case basis. To require the Applicant to contest findings from another case, particularly a case to which the Applicant was not a party, would deny the Applicant due process of law.

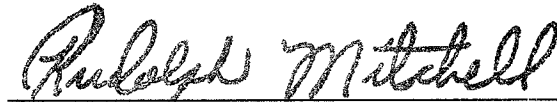
The Commission has examined this matter and sees no reason to deviate from its prior holding in this case. Therefore, we believe that the Intervenor's Petition for Rehearing and Reconsideration in this matter should be denied.

IT IS THEREFORE ORDERED THAT:

1. The Petition for Rehearing and Reconsideration of Order No. 94-1212 is hereby denied.

2. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

  
CHAIRMAN

ATTEST:

  
Executive Director

(SEAL)